

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

HERITAGE LEGISLATION AMENDMENT BILL 2013

Explanatory Statement

Revised following comments from the
Standing Committee on Justice and Community Safety – Legislative Scrutiny Committee

Presented by
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Outline

The Heritage Act was passed in 2004 and provides for the recognition, registration, conservation and promotion of places and objects of heritage significance and the protection of all Aboriginal places and objects in the ACT. The Act also provides for its review after five years of operation.

Following a period of review, and a report completed in 2010 by independent consultant, Mr Duncan Marshall, outlining 111 recommendations, the need for a number of amendments to the Act has become apparent.

The Heritage Legislation Amendment Bill 2013 (the Amendment Bill) addresses two key policy issues – providing the Minister with call-in powers in relation to exceptional circumstances for decisions affecting the registration or cancellation of a place or object and removing two appeal provisions – and provides for a range of other technical and administrative amendments.

The amendments create a more simplified, open and transparent process for registering and protecting the ACT's heritage places and objects.

The proposed approach gives effect to the Environment Protection and Heritage Council agreement that all jurisdictions adopt the National Heritage Convention (HERCON) heritage assessment criteria.

The Amendment Bill also provides for consequential amendments to the *Tree Protection Act 2005* and better streamlines with the *Nature Conservation Act 1980*.

Human rights analysis

The Amendment Bill has been reviewed in relation to the *Human Rights Act 2004*. The Human Rights Act in sections 21 (right to fair trial) and 27 (rights of minorities) recognises certain rights that arguably may be affected by the proposed law.

No appeal provision on a decision called-in by the Minister - Right to fair trial

Clause 73 limits reviewable decisions to those decisions made under the Act by the Council. A decision made by the Minister is final, and is not reviewable by the ACT Civil and Administrative Tribunal (ACAT). This amendment could be said to affect the right to fair trial under section 21 of the Human Rights Act.

This limitation recognises the particular nature of a call in matter. In deciding whether to call a matter in the Minister must take account of the public interest and issues affecting government policy and practice under new section 50B. It is in this sense a political decision. Consistent with other legislation in relation to call in matters these are matters that are best assessed by the Minister who is able to assess public concerns and is politically accountable to the wider community. In particular, this approach is consistent with similar provisions in the *Planning and Development Act 2007* whereby there is no review right on a decision called-in by the Minister.

Removal of ACAT merit review rights is also necessary to provide a measure of finality, that is to ensure that the decision on a matter called in by the Minister is made quickly and with certainty.

In making a decision the Minister is accountable to the Legislative Assembly and the wider community. The provisions at Clause 40 provide for open and transparent processes and public accountability, whereby the Minister must present to the Legislative Assembly the grounds for the decision.

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Notwithstanding the removal of rights of review by ACAT it will still be possible for interested parties to appeal the decision to the Supreme Court under the *Administrative Decisions (Judicial Review) Act 1989* (ADJR Act).

It is also important to note that merit review rights are retained in relation to a range of other decisions made under the heritage legislation, including an ability to request review of a decision by the Council to register or not register a place and object under section 40; and to cancel or not cancel the registration of a place or object under section 47. This ensures that in relation to the registration process as a whole there are significant avenues for merit and administrative review.

It is concluded that any limit on the right to fair trial through these amendments is reasonable and justified taking into account the factors identified under section 28 of the Human Rights Act. In summary, the limitation is minimal given that it is restricted to call in matters, the proposals are appropriate and proportionate given the nature of the call in power, the purpose of the limitation is directly relevant and necessary to ensuring the effectiveness of the call in power and there are no other practical alternatives to achieving the benefits sought.

Removal of provision to request review of decision not to provisionally register a place or object – right to fair trial

An interested person will no longer be able to apply to ACAT for request to review a decision of the ACT Heritage Council not to provisionally register a place or object. This amendment could be said to affect the right to fair trial under section 21 of the Human Rights Act.

The amendments will also ensure that decisions about provisional registration will be able to be determined relatively quickly and with a measure of finality and certainty. Incorporation of the ACAT process into these matters risks potential delay in the decision making process with possible costs to the parties involved as well as uncertainty pending the ACAT decision. For example, there may be a cost to the owner of a property who is prevented from doing any development work pending the outcome of an ACAT review of a decision to refuse provisional registration.

The limitation also seeks to ensure an efficient and appropriate use of ACT Government and Heritage Council resources by ensuring that these finite resources are not impacted by the need to respond to applications for review of provisional registration. The removal of the review provision will ensure that Government and Council resources are appropriately targeted towards the critical work of recognising, protecting and conserving heritage places and objects of the ACT.

While this provision has only been used four times under the existing heritage legislation, each matter has consumed vast resources of ACT Heritage and the Council. Three of the four cases resulted in a Tribunal hearing. The Tribunal upheld the Council's decision in all three cases. In the fourth case, the nominator supplied significant additional new information to the Council prior to a Tribunal hearing, which enabled the Council to review its previous decision and instead make a new decision to provisionally register the place. In all instances, the Council encourages nominators to provide as much information as possible at the time of nomination. This practice will remain.

It is also important to note that a decision not to provisionally register a place or object does not of itself prevent future applications for provisional registration in relation to the same place or object should additional grounds for making the application become apparent.

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The decisions that may be reviewed under the existing legislation and the range of interested parties who may seek review of a decision under the Heritage Act is wider than any heritage legislation in other jurisdictions, or comparable legislation in the ACT, such as the *Planning and Development Act 2007*, the *Nature Conservation Act 1980* and the *Tree Protection Act 2005*. Specifically, the existing Heritage Act is the only legislation in Australia that contains a provision to appeal a decision not to provisionally register a place or object. The proposal will bring ACT heritage legislation in line with all other jurisdictions and other comparable legislation in the ACT.

Community groups may feel that a decision not to provisionally register a place impacts on their future use or occupation of a place. However, the grounds for seeking and obtaining provisional and final registration are limited to the heritage significance of the place or object. It is important to note that any proposed work or development at a place, including any associated variation of the relevant lease, will require development approval under the *Planning and Development Act 2007* (unless exempt under the *Planning and Development Regulation 2008*). Development applications require public notification and, depending on the significance of the development, may be subject to third party ACAT merit review. This legislation provides avenues for comment on the future use of the place.

It is also important to note that merit review rights are retained in relation to a range of other decisions made under the heritage legislation, including an ability to request review of a decision by the Council to register or not register a place and object under section 40; and to cancel or not cancel the registration of a place or object under section 47. This ensures that in relation to the registration process as a whole there are significant avenues for merit and administrative review.

Other avenues will also remain for a person to seek review of decision. It will still be possible for interested parties to appeal the decision to the Supreme Court under the ADJR Act.

It is concluded that any limit on the right to fair trial through these amendments is reasonable and justified taking into account the factors identified under section 28 of the Human Rights Act. In summary, the limitation is minimal given that it is restricted to provisional registration and does not apply to full registration, the proposals are appropriate, directly relevant and necessary to ensuring efficient, cost effective decision making and a measure of finality and certainty. The measures are consistent with approaches taken in other jurisdictions. There are no other practical alternatives to achieving the benefits sought.

Removal of appeal provision against a decision to extend or not extend the period of provisional registration – right to fair trial

The Amendment Bill removes an appeal provision against a decision to extend (or not extend) the five month provisional registration period. This amendment could be said to affect the right to fair trial under section 21 of the Human Rights Act.

The removal of this provision will create consistency with heritage legislation in other jurisdictions and with comparable legislation in the ACT. It will also ensure that Government and Council resources are appropriately targeted towards the critical work of recognising, protecting and conserving the ACT's heritage places and objects. The amendment will also remove a provision that presents practical difficulties.

This is a minor appeal provision which has never been used. The need for it is therefore questionable, and the limitation its removal will impose is marginal.

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The provision presents practical difficulties as it is likely that a period of extension (3 months), or the provisional registration period where an extension was not granted, would end before an appeal was determined by the Tribunal.

Again it is important to note that merit review rights are retained in relation to a range of other decisions made under the heritage legislation, including an ability to request review of a decision by the Council to register or not register a place and object under section 40; and to cancel or not cancel the registration of a place or object under section 47. This ensures that in relation to the registration process as a whole there are significant avenues for merit and administrative review.

Other avenues will also remain for a person to seek review of decision. It will still be possible for interested parties to appeal the decision to the Supreme Court under the ADJR Act.

It is concluded that any limit on the right to fair trial through these amendments is reasonable and justified taking into account the factors identified under section 28 of the Human Rights Act. In summary, the limitation is minimal given that it is restricted to extension of provisional registration, the review right has not been used in the past and does not apply to full registration. The proposals are appropriate, directly relevant and necessary to ensuring efficient, cost effective decision making and a measure of finality and certainty. The measures are consistent with approaches taken in other jurisdictions. There are no other practical alternatives to achieving the benefits sought.

Rights of minorities – recognition and equality before the law

The Amendment Bill promotes the rights of minorities.

Under heritage legislation in the ACT, Aboriginal heritage is afforded greater recognition, protection and conservation than other types of heritage such as natural and historic, therefore creating inequality. This inequality already exists in the ACT's heritage legislation and the nature and extent will not be altered through the Amendment Bill.

The Aboriginal community considers all objects and places of their past to be significant. Much of the Aboriginal heritage in the ACT has already been lost. It is important that the comparatively small number of Aboriginal places and objects remaining in the ACT be recognised and protected for future generations. Further, Aboriginal heritage places and objects are often located subsurface. This creates an increased risk of unintentional disturbance and damage at the time of any ground works. The heritage legislation seeks to limit this risk through protection provided for Aboriginal heritage.

Inequality is created whereby *all* Aboriginal places and objects in the ACT are protected, but not all places and objects of historic built form, nor every natural place, are protected under the Act. Places and objects of historic or natural heritage must meet certain criteria and thresholds in order to be protected under the Act.

This matter positively affects rights of minorities (HRA section 27) and also affects matters of recognition and equality before the law (HRA Subsection 8(3)).

The importance of the purpose of the limitation is to ensure that Aboriginal places and objects are afforded appropriate recognition, protection and conservation under heritage legislation in the ACT.

It is concluded that rights under HRA subsection 8(3) are limited in that heritage legislation affords a particular status in relation to Aboriginal places and objects. However, the limitation is reasonable and justified taking into account the factors identified under section

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28 of the Human Rights Act. The proposals are appropriate, directly relevant and necessary to ensuring appropriate recognition, protection and conservation of Aboriginal places and objects. The proposals in the Amendment Bill do not create any significantly greater recognition or protection for Aboriginal places and objects than is already afforded under current legislation. The proposals are considered important to recognise the unique and special circumstances of Aboriginal heritage. There are no other practical alternatives to achieving the benefits sought.

Financial implications

The Amendment Bill has no direct financial implications. Implementing the proposed amendments within the current budget may include staging of initiatives and policies. Any financial impacts resulting from the Amendment Bill will be absorbed within current budgets.

Revenue/Cost Implications

The proposed heritage framework provides greater confidence and clarity for economic development in relation to heritage places. It will also better incorporate economic considerations into the planning and development stage, once heritage significance has been established.

In accordance with section 36 of the *Legislation Act 2001*, a Regulatory Impact Statement (RIS) for the amendments has been prepared.

Detailed explanation of formal clauses

Part 1- Preliminary

Clause 1 – Name of the Act

Clause 1 is a formal requirement. It names the Bill as the *Heritage Legislation Amendment Act 2013*.

Clause 2 - Commencement

Clause 2 is a formal requirement. It states that the Bill commences on the day after its notification.

Clause 3 - Legislation amended

Clause 3 notes that the Bill amends the *Heritage Act 2004* and the *Tree Protection Act 2005*.

Part 2 – Heritage Act 2004

Objects of Act

Clause 4 - Section 3(1)(a)

Section 3(1)(a) of the *Heritage Act 2004* establishes a system for the ‘recognition, registration and conservation of natural and cultural heritage places and objects, including Aboriginal places and objects’.

Clause 4 clarifies the intent of this section. The meaning of this section is not altered. However, the amended wording provides greater clarity and certainty around the notions of natural heritage significance, cultural heritage significance – which includes Aboriginal and historic – and Aboriginal places and objects.

These definitions ensure that the provisions of the legislation include all places and objects of heritage significance (those which meet the heritage significance criteria and are registered), and all Aboriginal places and objects, regardless of whether or not they meet the heritage significance criteria.

The wording of Clause 4 better reflects the new definitions provided under Clause 7 relating to each of these concepts.

Clause 5 – Sections 3(2) and (3)

Clause 5 amends the wording of sections 3(2) and (3) of the *Heritage Act 2004* in relation to functions under the Act to create greater clarity and certainty about the intent and meaning of the legislation in relation to the protection of heritage places and objects. In particular, Clause 5 ensures that no harm can be done to a heritage place or object, or to an Aboriginal place or object, unless it is not reasonably practicable to do otherwise and that all reasonable steps have been taken to minimise harm.

This clause is particularly critical in enabling economic factors to be considered in planning and development opportunities for places and objects of heritage significance, and for Aboriginal places and objects, where appropriate.

The intent of sections 3(2) and (3) of current legislation is not altered.

Clause 6 – Section 3A

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Clause 6 clarifies that the Council may register an urban tree where it forms part of the heritage significance of the place. This clause also prevents the Council from registering an urban tree or trees unless it forms part of a broader registration. It does not alter the intent or meaning of section 3A in the *Heritage Act 2004*, but merely clarifies this section.

The amendment clarifies that there can be no duplication between the heritage legislation and the *Tree Protection Act 2004*.

Important concepts

Clause 7 – Section 8

Clause 7 amends the meanings of ‘object’ and ‘place’ for the purposes of the legislation. It merely clarifies the intent of these sections, and does not alter the meanings.

In particular, the wording which describes the features which a ‘place’ includes has been amended from ‘an item at the place’ to ‘an object or feature historically associated with the place’. This clarifies that an item at the place must have an historical association with, and must also be located at the place, in order for it to form part of the registration of a place.

The inclusion of the example: a ‘view to or from the place, including visible landscapes’ clarifies that, in order for a view to be considered part of a place, it must form part of the registered boundary for that place and must have an historical association with the place.

Clause 7 – Section 9

Clause 7 amends the wording for the definitions of ‘Aboriginal object’ and ‘Aboriginal place’ at Section 9 of the Amendment Bill. It does not change the intent of these definitions, but provides greater clarity.

All Aboriginal places and objects are of significance to Aboriginal people. The intent of the definition is to ensure all Aboriginal places and objects are protected under the Amendment Bill.

The definition for ‘Aboriginal object’ and ‘Aboriginal place’ in the *Heritage Act 2004* are problematic through their inclusion of terminology such as an Aboriginal place or object needing to have ‘particular significance’.

The amendment removes the reference to ‘particular significance’ to ensure that *all* Aboriginal places and objects are protected under the Act, without the need to meet any thresholds or tests of ‘particular significance’.

The definition is further amended to refer to the physical and historical attributes of an Aboriginal place or object, rather than an assumed significance by Aboriginal people.

Clause 7 – Section 10

Clause 7 amends the heritage significance criteria at section 10 to align with the National Heritage Convention (HERCON) criteria.

The former national Environment Protection and Heritage Council (replaced in 2011 by the establishment of the national Standing Council on Environment and Water) has adopted the HERCON criteria as a national standard for guiding heritage assessment. Many jurisdictions in Australia have moved to the HERCON criteria or are in the process of moving to it.

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The overall coverage of the HERCON criteria is the same as the current ACT criteria, but the HERCON criteria are more succinct. Minor changes have been made to better suit the circumstances of the ACT.

Sections 10A and 10B under Clause 7 are new sections which provide definitions for the concepts of ‘cultural heritage significance’ and ‘natural heritage significance’.

These definitions assist with an interpretation of these concepts throughout the Act.

The insertion of these sections does not change the intent of the Act or its meaning in any way.

Clause 8 – Section 11

Clause 8 amends the heading of Section 11 from ‘Registered’ to ‘Meaning of registered’ to provide a better explanation to what this section refers.

Clause 9 – Section 12

Clause 9 amends the heading of Section 12 from ‘Registration details’ to ‘Meaning of registration details’ to provide a better explanation to what this section refers.

Clause 10– Section 13

Clause 10 ensures that the definitions for interested person which were included in various sections throughout the *Heritage Act 2004* are included in the one place in the Amendment Bill.

This provides consolidation for easier reference.

Clause 10 provides a definition for interested persons in the context of notification of a decision, and for the purposes of reviewable decisions and appeal provisions.

This clause provides that the Heritage Council is no longer required to notify the Planning and Land Authority, the Conservator of Flora and Fauna, *and* the National Capital Authority about all decisions affecting a place or object. It must only notify each entity where the decision affects a place or object relevant to that entity.

The clause also includes a range of additional interested persons who must be notified about heritage matters relating to a place or object. The broadened definition of interested persons is extended to include landscape architects, the designer or creator of an object (including artist), any person who made an urgent provisional registration application, any person who made a cancellation proposal and any person who made a register amendment application.

The consolidation of all definitions of interested persons in the one place in the Act clarifies the notion of interested persons who must be notified of decisions under the Act, and those who have a right of review for various decisions.

Clause 11 – Section 14

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Clause 11 amends the heading of Section 14 from ‘representative Aboriginal organisations’ to ‘Meaning of representative Aboriginal organisation’ to provide a better explanation to what this section refers.

Clause 12 – Section 14(7)

A new note is inserted by Clause 12 to refer to section 46 of the *Legislation Act 2001*, whereby the power to make a declaration includes the power to amend or repeal the declaration. This clarifies that the Minister may amend or repeal the declaration of an entity as a representative Aboriginal organisation. This does not change or alter the intent of this section in the *Heritage Act 2004* any way. It merely clarifies the provision.

Clause 13 – Section 15

Clause 13 omits Section 15 (Conservation Management Plan) from the Bill. The concept of a Conservation Management Plan is included under new section 61J and 61K.

Clause 14 – new sections 19A to 19C

Clause 14 sets out new processes which require the Heritage Council to notify the Minister ahead of decisions about a registration or cancellation matter.

This clause is necessary to give effect to the Minister’s new call-in provisions, established under amendments at Clause 40 – new part 7A.

The notification established at Clause 14 is called a ‘heritage finding’.

New sections 19A and 19B provide detail about the information which the Council is required to provide to the Minister as part of its ‘heritage finding’, and the process through which this is to occur.

New section 19C makes provision that the Council must consult with the Flora and Fauna Committee about matters affecting natural heritage significance. This includes all matters for which the Council has authority under the Heritage Act.

Heritage Register

Clause 15 – Section 20(3)(a)

Section 20(3) details the information which is required to be held in the ACT Heritage Register for each place or object nominated.

Clause 15 amends the wording of Section 20(3)(a) from ‘the nomination details’ to ‘details of the place or object’. This change is necessary to give effect to new definitions of ‘nomination’ and ‘nominated place or object’.

Clause 16 – Sections 20(3)(b) and (c)

Sections 20(3)(b) and (c) in the *Heritage Act 2004* refer to the term ‘nomination’ in relation to information which must be kept in the heritage register.

Clause 80 - Dictionary – omits the definition of ‘nomination’ to instead provide definitions for a ‘nomination application’ and a ‘nominated place or object’.

Accordingly, Clause 16 amends the wording of ‘nomination’ to ‘nomination application’. This will have the effect of ensuring that the meaning and intent of this section remains clear.

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Clause 17 – New section 20(4)(ba)

Clause 17 makes provision that each heritage agreement must be included in the heritage register, in addition to each heritage guideline, each heritage direction and each enforcement order which section 20(4) already provides for.

Clause 18 – Section 24

Section 24 of the current heritage legislation enables the Council to correct a mistake or omission in the heritage register subject to any requirements of the regulations.

Clause 18 makes provision that, where the Council intends to add extra information to a place registered under division 6.2, which affects its registration details under section 12(a), (c) or (d) – name, description including extent or boundary, or statement of heritage significance – the Council must make a ‘further heritage decision’ about those details. A further heritage decision must be made in accordance with the Act as though the additional information constituted a nominated place or object. Consequently, the provisions of Part 6 apply.

The existing registration details of the already registered place or object remain unaffected by the further heritage decision, and by the consequent processes under Part 6.

However, if a further heritage decision is made under section 40 – decision about registration – to proceed to final registration for the additional registration details, the existing and additional registration details are merged to become one registration.

Review rights are applicable only to the matters amended by the further heritage decision.

Where it is intended that the registration details for a place or object be reduced, a cancellation (or partial cancellation) under Part 7 will continue to apply.

Clause 18 further enables any person to make an application to request that the Council includes additional details in the heritage register, and stipulates the way in which this must occur, including the need for the application to be in writing and given to the Council. A form may be approved for this purpose.

The Council may update registration details under section 12(b) – location or address of the place or object – without the need to follow any statutory processes. The Council may also update any other information contained in a heritage register citation which is not a registration detail at section 12 (a), (c) or (d), without the need to follow a statutory process. An example includes the historical summary of a place or object.

Heritage Guidelines

A range of new provisions are introduced through amendments to Part 5 – Heritage Guidelines.

The amendments seek to better align the processes and procedures for making heritage guidelines with those for registration decisions at Part 6 of the legislation. This will ensure that the process for making heritage guidelines is undertaken in a timely manner, is rigorous, open and transparent, and enables appropriate public consultation, and consultation with the Minister.

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Clause 19 – Section 25(1)

Under current provisions of the *Heritage Act 2004*, heritage guidelines can only be made for places and objects with heritage significance. Clause 19 will amend those provisions to clarify that guidelines may only be made for registered places or objects, and will ensure that heritage guidelines may also be made for Aboriginal places and objects, regardless of whether or not they are registered. This amendment is consistent with other provisions throughout the Act which seek to recognise and conserve all Aboriginal places and objects.

This amendment creates positive engagement with human rights legislation, by creating greater recognition and protection for the heritage of a minority group - Aboriginal people.

Clause 20 – New section 25(2)

Amendments at clause 22 require the Council to provide a report to the Minister following the period of public consultation, and enable the Minister to direct the Council to further consider any issues relevant to the proposed guidelines.

Clause 20 ensures that the Council may make guidelines only after it has complied with any such direction given by the Minister and if satisfied that the guidelines will promote effective conservation of a place or object.

This clause is a mirror process of section 40(2) of the *Heritage Act 2004* in relation to a decision on registration.

Clause 20 makes a further minor amendment to the wording of section 25(2) of the current legislation, to state that ‘a guideline is a disallowable instrument’. This amendment brings the wording in line with current drafting practice and does not alter the intent of this section in any way.

Clause 21 – Section 26(5)

Current legislation requires the Council to consider any comments about the proposed guidelines made before the end of the public consultation period. Clause 21 extends this provision to enable the Council to consider comments made after the end of the consultation period, at its discretion.

Clause 22 - New sections 26A to 26E

Clause 22 provides for new sections 26A to 26E. This clause imposes certain timeframes which apply to the process for making heritage guidelines. The timeframes are aligned with those for the making of decisions about registration matters. Under this clause, heritage guidelines for a place must be made within five months and for a precinct within nine months from the date of public notification about the proposal to make the guidelines.

New section 26A ensures that Heritage Guidelines for a place or object cannot be made before the place or object is registered under Division 6.2. Where Guidelines are being made for an Aboriginal place or object, this section does not apply, and Guidelines may be made at any time.

Clause 22 also establishes the process for extension of these timeframes.

An extension may be given for a further period of three months. There are three scenarios under which an extension may apply to the period for making Heritage Guidelines.

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An automatic extension is given if the guidelines are for a place or object which is provisionally registered and an extension is given to the provisional registration period. An automatic extension also applies if the Minister directs the Council to give further consideration to issues raised in or arising from its report on public consultation, or another relevant matter. An extension may also apply if the Council seeks an extension from the Minister at least 25 days before the end of the initial period, and the Minister does not object.

Provisions in new section 26A ensure that a maximum of only two extension periods can apply. If an automatic extension is granted on the basis of an extension to the provisional registration period for the place or object, then the Council cannot seek a further extension for the period to make guidelines. These two extensions are mutually exclusive. However, if either is in force, and the Minister directs the Council to further consider issues, then an automatic further period of three months applies.

An extension sought by the Council requires public notification through a notifiable instrument to be notified under the Legislation Act, and published in a daily paper.

The *Heritage Act 2004* already makes provision for the Council to undertake a period of public consultation about the proposal to make heritage guidelines.

Clause 22 makes provision that, following the period of public consultation, the Council must prepare a report on the results of consultation for the Minister.

This clause also makes provision to enable the Minister, on receipt of the report, to direct the Council to consider in more detail any matters raised during the public consultation period, or any other matters the Minister considers relevant. A direction by the Minister must be provided within 15 working days after the Minister has received the report.

Where guidelines relate to a specific place or object and the registration is cancelled, the guidelines are also automatically cancelled.

New section 26E also creates a statutory requirement for the Council to notify all interested persons, as soon as practicable, about matters related to the processes for making Heritage Guidelines.

Registration of places and objects

Clause 23 – Sections 28 to 29

Sections 28 to 32 of the *Heritage Act 2004* make provision for processes related to the nomination of a place or object for provisional registration, including a request for an urgent decision about provisional registration.

Clause 23 clarifies these sections, to provide distinction between the terms ‘nomination application’ and ‘nominated place or object’.

A ‘nomination application’ is the application by a person to request that a place or object be provisionally registered.

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A ‘nominated place or object’ is a new term which refers to a place or object for which the Council has accepted a nomination application, but for which no decision on provisional registration has yet been made.

These definitions assist in interpreting the processes associated with registration under the Heritage Act.

Clause 23 further requires the Council to either dismiss or accept each nomination application which it receives. Currently, the *Heritage Act 2004* makes provision only for the Council to dismiss a nomination. Clause 23 establishes the processes which must be followed subsequent to a decision by the Council to either accept or dismiss a nomination application.

Clause 23 – Section 30

Clause 23 also amends section 30 of the *Heritage Act 2004* to clarify the processes for a request for urgent provisional registration. In particular, this clause establishes new provisions to enable the Council to either accept or dismiss an application for request for urgent decision, and for notification of its acceptance or dismissal.

Currently, the *Heritage Act 2004* requires the Council to use its best endeavours to make a decision about provisional registration for which a request for urgent decision has been made within 20 working days for all places and objects. Clause 23 amends this section to reflect that the Council must make a heritage finding before it can make a decision about provisional registration. This is necessary to give effect to the new call-in provisions for the Minister. As a result, the timeframe is amended to refer to 20 working days for the Council to prepare its heritage finding. However, this timeframe is amended to 60 working days where the request for urgent decision relates to a precinct. Further provisions at clause 23 place an onus on both the Minister and Council to progress processes in relation to a request for urgent decision as soon as practicable.

Clause 23 – section 31

Section 31 of the *Heritage Act 2004* requires the Council to consult with each representative Aboriginal organisation prior to its decision on provisional registration. Clause 23 amends this section to reflect other amendments in relation to the need for the Council to prepare a heritage finding prior to making a decision on provisional registration, and enabling the Minister to have opportunity to call-in the decision. In particular, Clause 23 requires the Council to consult with representative Aboriginal organisations prior to preparing a heritage finding.

This clause does not change the intent or meaning of the provision, but simply updates the requirement to align with other amendments.

Clause 23 - new section 31A

New section 31A makes provision that the Council must consult with the Flora and Fauna Committee for any place or object which forms part of the natural environment before making a heritage finding. The Flora and Fauna Committee is considered to have expertise which may offer valuable comments about the provisional registration of natural places and objects.

Clause 23 – section 32

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Section 32 establishes that the Council must make a decision about provisional registration for any place or object for which a nomination application has been accepted, and that they may make a decision about provisional registration for a place or object for which no nomination application has been made.

The amended wording of this section under clause 23 ensures there is no presumption in favour of deciding to provisionally register. The intent of this section is not altered or amended.

Section 32 includes new provisions which prevent the Council from making a decision about provisional registration which is inconsistent with their heritage finding for the place or object. This requirement prevents a situation where the Minister might miss an opportunity to call in a decision had he or she known that the Council were to make a different decision to that indicated on their heritage finding. The provision creates absolute certainty at the time of preparation of a heritage finding about the decision which the Council will make at the time of deciding on provisional registration.

Clause 23 also includes provision to prevent the Council from making a decision about provisional registration if the Minister has used his or her call-in powers to make a decision about provisional registration and has not referred the matter back to the Council. This ensures there can be no duplication in the decision making process.

Section 32 no longer refers to the need for the Council to be satisfied, on reasonable grounds, that the place or object may have heritage significance in order for it to be provisionally registered. However, this requirement is still implicit in the intent of the legislation, and in accordance with the objects of the Act at section 3(1)(a) and the exercise of the Council's functions at section 18 (a).

Clause 24 – Section 34(1)

Clause 24 amends the wording of section 34(1) – Notice of decision about provisional registration – to clarify the intent of this section.

Clause 25 – Section 34(2)(b)

Section 34(2)(b) of the current legislation makes provision for a notifiable instrument detailing a decision of the Council about provisional registration to be notified under the *Legislation Act 2001* in three working days.

Clause 25 amends this timeframe to five working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Clause 26 – Section 34(3)

Section 34(3) of current legislation makes provision for the Council to use its best endeavours to provide a copy of the notice about decision on provisional registration to interested persons within 10 working days.

Clause 26 amends this timeframe to 15 working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

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Clause 27 – Sections 35 and 36

Section 35 of current legislation establishes that the period of provisional registration is for 5 months from the day the place or object is provisionally registered.

Section 36 makes provision for the extension of the provisional registration period. However, due to the way this provision is written, it is not possible to give any effect to the extension which this provision seeks to provide.

The *Heritage Act 2004* is silent on the status of a place or object where a provisional registration period lapses and there has been no further extension, nor decision on final registration.

Clause 27 amends the period of provisional registration to 9 months where it concerns a precinct, corrects the provision to ensure that extensions may occur, sets out the circumstances under which an extension may occur, and clarifies the status of a place for which the provisional registration period has lapsed.

Heritage precincts can contain large numbers of properties. Given the potential for an extensive number of submissions, and the complexity of issues raised during the public consultation period, it is necessary that the provisional registration period for a precinct be nine months, to ensure that matters are appropriately addressed.

Under clause 27, the period of provisional registration may be extended by a further period of three months if the Council seeks an extension to resolve complex issues and the Minister does not object. This will assist to overcome administrative difficulties with the *Heritage Act 2004* where it is not always possible for the Council to make a decision on registration prior to the end of the provisional registration period. An automatic extension of three months applies if the Minister directs the Council to further consider issues raised in, or related to the report on public consultation.

The extensions are not mutually exclusive, and it is possible for both extensions to apply, for a total period of extension up to six months.

An extension sought by the Council requires public notification through a notifiable instrument to be notified under the Legislation Act, and publishing in a daily paper.

The clause also clarifies that provisional registration for all places or objects is deemed to end, prior to the full period of provisional registration, if the Council or Minister decides to proceed to final registration, or decides not to proceed to final registration. This is deemed a termination event. This does not change the intent or meaning of provisions of the *Heritage Act 2004*, but merely clarifies the matter

Clause 27 further clarifies that, where the period of provisional registration ends and no extension has been granted, nor any decision made on final registration, the place or object will revert back to being a ‘nominated place or object’ and will continue to be afforded a level of protection under the Act.

This provision will apply for all places and objects for which the period of provisional registration has lapsed with no decision on final registration and no further extension, regardless of whether they were previously a nominated place or object, or whether they were

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provisionally registered by the Council without being nominated. A new definition of 'nominated' at clause 79 – Dictionary, gives further effect to this clause.

Clause 28 – section 37(2)

The *Heritage Act 2004* states that the Council must consider any comments made during the public consultation period before deciding whether to register a place or object. Clause 28 will also enable the Council to use its discretion to consider any late comments which are made after the end of the public consultation period.

A new note is included at section 37(2) which ensures that the Council must provide the Minister with a heritage finding before making a decision about whether to register a place or object. This provision is necessary to give effect to new provisions that give the Minister call-in powers about registration decisions. The note also requires the Council to prepare the heritage finding as soon as practicable after the close of the public consultation period.

Clause 29 – Sections 38 to 41

Sections 38 and 39 of current legislation require the Council to provide the Minister with a report on the outcomes of public consultation, and enable the Minister to direct the Council to consider matters raised in more detail.

The new note under Section 37(2), and amended through Clause 28 above, requires the Council to provide the Minister with a notice of its heritage finding. This replaces the requirement of section 38 of the *Heritage Act 2004* for the Council to provide a report on public consultation to the Minister. In providing a heritage finding to the Minister at section 37(2) and in accordance with other new provisions at section 19(A)(2)(e), the notice must contain the information which was previously required at section 38, namely:

- A statement identifying any issues raised during the public consultation period;
- A copy of the written comments received; and
- Any changes based on the comments received during public consultation period.

Clause 29 subsequently omits Section 38.

Clause 29 enables the Minister to direct the Council not only to further consider matters raised during public consultation, but also to further consider any other matter relevant to the decision about registration for the place or object and relating to the Council's functions.

Clause 29 further amends the current sections 40 and 41 of the *Heritage Act 2004* to remove contradictory provisions about the 'decision on registration' and 'registration'. This clause clarifies these sections, and ensures that where there is a decision not to register a place or object, the date of decision does not take effect until after the appeal period has ended. This will ensure continued protection for a provisionally registered place or object until such time as an appeal is lodged and a direction given, where applicable.

Clause 29 includes new provisions which prevent the Council from making a decision about registration which is inconsistent with their heritage finding for the place or object. This requirement prevents a situation where the Minister might miss an opportunity to call in a decision had he or she known that the Council were to make a different decision to that indicated on their heritage finding. The provision creates absolute certainty at the time of preparation of a heritage finding about the decision which the Council will make at the time of deciding on registration.

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Clause 29 also includes provision to prevent the Council from making a decision about registration if the Minister has used his or her call-in powers to make a decision about registration and has not referred the matter back to the Council. This ensures there can be no duplication in the decision making process.

Section 40 no longer refers to the need for the Council to be satisfied, on reasonable grounds, that the place or object has heritage significance in order for it to be registered. However, this requirement is still implicit in the intent of the legislation, and in accordance with the objects of the Act at section 3(1)(a) and the exercise of the Council's functions at section 18 (a).

Clause 30 – Section 42 (2)(b)

Section 42(2)(b) of the current legislation makes provision for a notifiable instrument detailing a decision of the Council about registration to be notified under the *Legislation Act 2001* in three working days.

Clause 30 amends this timeframe to five working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Clause 31 – Section 42(3)

Section 42(3) of current legislation makes provision for the Council to use its best endeavours to provide a copy of the notice about decision on registration to interested persons within 10 working days.

Clause 31 amends this timeframe to 15 working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Clause 32 – New division 6.3

Clause 32 makes provision to ensure that there is no duplication between registrations under the Heritage Legislation Amendment Bill 2013 and the *Nature Conservation Act 1980*. It does this by ensuring that where the significance of a place or object derives solely from the natural heritage significance of flora or fauna for which a declaration is in force, or may be in force, under the *Nature Conservation Act 1980* it cannot also be registered under the Heritage Act.

However, if the flora or fauna forms part of a place which also has aspects of cultural heritage significance, it may be registered as part of the broader registration for that place or object.

Cancellation of places and objects

Clause 33 – Section 43

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Clause 33 makes new provision that a person, or the Council, may make a proposal to cancel a registration. While a registration may be cancelled under the 2004 heritage legislation, there is no provision to enable a person to make a proposal for this. Clause 33 simply clarifies this process, and aligns the process with other applications under Part 6.

The clause also ensures that the provisions for making a cancellation proposal and for the Council to accept or dismiss a proposal for a cancellation are mirrored with those for making a nomination application.

Clause 34 – Section 44(2)(b)

Section 44(2)(b) of the current legislation makes provision for a notifiable instrument detailing a decision of the Council about a cancellation proposal to be notified under the *Legislation Act 2001* in three working days.

Clause 34 amends this timeframe to five working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Clause 35 – Section 44(3)

Section 44(3) of the *Heritage Act 2004* makes provision that the Council must use its best endeavours to give a copy of a notifiable instrument for a cancellation proposal to each interested person within 10 working days after the day the proposal is given to the Council.

Clause 35 amends this timeframe to 15 working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Clause 35 further amends this provision to reflect that the Council may also make a cancellation proposal, as per Clause 33.

Clause 36 – Section 45

Clause 36 amends the wording of section 45 to clarify that a cancellation proposal only applies to an Aboriginal place or object if it is registered under Division 6.2. This does not change the intent or meaning of this section. It merely clarifies it.

The provisions at this clause further align with other new provisions in relation to the requirement for the Council to prepare a heritage finding to notify the Minister about the decision it intends to make on cancellation. In particular, this clause ensures that the Council consults with representative Aboriginal organisations ahead of preparing its heritage finding, rather than simply ahead of making the decision on cancellation. This ensures that the Council is properly informed about the views of representative Aboriginal organisations as part of the process for making the heritage finding, and considers these views in determining their heritage finding which will inform their decision.

Clause 37 – New section 45A

Consistent with new provisions at Clause 23, whereby the Council must consult with the Flora and Fauna Committee before preparing a heritage finding ahead of a decision on provisional registration, Clause 37 ensures that the Council must consult with the Flora and Fauna Committee before making a heritage finding in relation to a cancellation proposal for a place or object with natural heritage significance.

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Clause 38 – Section 46(2)

The *Heritage Act 2004* makes provision that the Council must consider any comments made during the public consultation period before deciding whether to cancel the registration of a place or object. Clause 38 will enable the Council to use its discretion to consider any late comments which are made after the end of the public consultation period.

A new note is inserted at section 46(2) which ensures that the Council must provide the Minister with a heritage finding before making a decision about whether to cancel the registration of a place or object. This provision is necessary to give effect to new provisions that give the Minister call-in powers about registration decisions. The note will also require that the Council prepares the heritage finding as soon as practicable after the close of the public consultation period.

Clause 39 – Sections 47 to 49

A new note under Section 46(2), and amended through Clause 14 above, requires the Council to prepare and provide to the Minister a heritage finding before making a decision about cancellation. This introduces new requirements for the Council to report to the Minister, through the heritage finding, about the results of public consultation on a cancellation proposal. Provisions at new section 19A(2)(f) require the notice of heritage finding to contain the following information:

- A statement identifying any issues raised during the public consultation period; and
- A copy of the written comments received.

Clause 39 enables the Minister to direct the Council to further consider matters raised during public consultation, and also to further consider any other matter relevant to the decision about registration for the place or object and relating to the Council's functions.

Clause 39 also removes contradictory provisions about the 'decision about cancellation proposal', 'cancellation of registration of place or object', and 'notice of decision about cancellation'. This clause clarifies these sections, and ensures that where there is a decision to cancel the registration of a place or object, the cancellation date does not take effect until after the appeal period has ended. This will ensure continued protection for a registered place or object until such time as an appeal is lodged and a direction given, where applicable.

New provisions at this clause also prevent the Council from making a decision about cancellation which is inconsistent with their heritage finding for the place or object. This requirement prevents a situation where the Minister might miss an opportunity to call in a decision had he or she known that the Council were to make a different decision to that indicated on their heritage finding. The provision creates absolute certainty at the time of preparation of a heritage finding about the decision which the Council will make at the time of deciding on cancellation.

Clause 39 also includes provision to prevent the Council from making a decision about cancellation if the Minister has used his or her call-in powers to make a decision about cancellation and has not referred the matter back to the Council. This ensures there can be no duplication in the decision making process.

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Section 49 of the *Heritage Act 2004* makes provision for the Council to use its best endeavours to provide a copy of the notice about decision on cancellation to interested persons within 10 working days.

Clause 39 amends this timeframe to 15 working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Section 49(2)(b) of the current legislation makes provision for a notifiable instrument detailing a decision of the Council about cancellation to be notified under the *Legislation Act 2001* in three working days.

Clause 39 amends this timeframe to five working days. This amendment will help to reduce administrative burdens and practical difficulties with the implementation of the *Heritage Act 2004*.

Ministerial call-in powers for referable heritage matters

Clause 40 – new part 7A

Clause 40 inserts a new part into the Act, to give effect to new provisions which enable the Minister to have a call-in power in relation to registration and cancellation decisions.

This part establishes that the Minister may call-in the following decisions:

- A decision not to provisionally register a place or object;
- A decision to or not to provisionally register a place or object for which an application for urgent decision has been made;
- A decision to or not to register a place or object; and
- A decision to or not to cancel the registration of a place or object.

Complimentary sections to Clause 40 are amended in the Amendment Bill to make provision that the Council must notify the Minister of its intent to make any of the above decisions – a ‘heritage finding’ – ahead of making the decision. This ensures that the Minister has ability to call-in the decision prior to the Council making the decision.

Following the Minister’s receipt of a ‘heritage finding’, Clause 40 then establishes the processes and timeframes under which the Minister may utilise the call-in power.

The clause also establishes the criteria under which the Minister may utilise the call-in power:

- The likelihood of a heritage decision by the Council that is not in the public interest;
or
- The likelihood of a major policy issue being raised; or
- The likelihood of a substantial effect on the achievement or development of an object of the Territory Plan.

In using a call-in power to affect a registration decision, the Minister must give consideration to the heritage finding prepared by the Heritage Council, and any other matter prescribed by regulation.

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The criteria under which the Minister may use the call-in provision may enable consideration of the economic implications of heritage registration, where there is a need to do so for reasons pertaining to the three criteria under which the Minister may call-in a decision.

Under this clause, the Minister will have 10 working days in which to direct the Council to refer to him or her a decision for which a request for urgent decision has been made, and 15 working days for all other decisions which the Minister may call-in. The Council must provide to the Minister all related and relevant material associated with the heritage finding, and must notify all interested persons about the Minister's direction.

Clause 40 makes further provision that, after the Minister has received all relevant material, he or she may decide to refer the matter back to the Council for a decision, or to make the decision him/herself. Where the Minister intends to make a decision, Clause 40 establishes the need for notification of this decision under the Legislation Act, in a daily newspaper and to all interested persons.

The Minister also must notify the Council of its decision.

Clause 40 further makes provision that the Minister must present the details and grounds for a decision about a registration or cancellation matter to the Legislative Assembly, within three sitting days after he or she makes the decision. This ensures that the process is open and transparent.

Where the Minister utilises the call-in power and makes a decision to provisionally register a place or object, this is taken to be final registration. There is no mechanism for public consultation nor review right.

Management of Aboriginal places and Aboriginal objects

Clause 41 – Part 8 Heading

Clause 41 amends the heading of Part 8 of the Act from 'Discovery of Aboriginal places and objects' to 'Management of Aboriginal places and Aboriginal objects'.

This reflects other changes which are made throughout Part 8 to broaden the provisions of that Part.

Currently, Part 8 of the *Heritage Act 2004* makes provision for aspects related only to the discovery of Aboriginal places and objects. Other matters relating to Aboriginal places and objects are provided elsewhere throughout the legislation.

Clause 42 – New sections 53A to 53C

Clause 42 ensures that a range of matters pertaining to the conservation and management of Aboriginal places and objects are included together in the one place in the Act, under Part 8.

Matters pertaining to Aboriginal places and objects, which were already provided for in section 115 of the *Heritage Act 2004* and which are now moved to Part 8 relate to a repository for Territory-owned Aboriginal objects. In addition, Part 8 will also include new provisions clarifying the ownership of Aboriginal objects on Territory land.

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Currently, wording at section 115 requires the Minister to ‘consult with, and consider the views of, the Council and each representative Aboriginal organisation’. Wording at new section 53B requires the Minister to ‘consult the Council and each representative Aboriginal organisation’. This does not change the need for the Minister to consider the views of the Council and representative Aboriginal organisations. This requirement is implicit in the wording ‘consult’. The amendment to this wording simply aligns with the correct terms and phrases for legislation.

New section 53C clarifies the circumstances under which the Territory is considered to be the owner of Aboriginal objects.

Restricted information

Clause 43 – Section 54(1) and (2)

Clause 43 amends the wording of section 54(1) and (2) to clarify the circumstances under which the Council may declare restricted information. It does not change the intent or meaning of this section.

Land Development Applications

Clause 44 – Section 60(1)

Under the *Heritage Act 2004*, the Council may give written advice to the planning and land authority for any place or object nominated for provisional registration. Clause 44 will prevent the Council from providing advice on a nominated place or object where it is unlikely that the place or object has heritage significance and where it is therefore unlikely that it will ever be registered.

Clause 45 – Section 61(1)(a)

Clause 45 amends the wording of section 61(1)(a) consistent with the amendments at Clause 44.

Clause 46 – Section 61(3)(a)

Clause 46 amends the wording of section 61(3)(a) – Requirements for Council’s advice about development, to ensure consistency with new wording at Clause 5, section 3A(2) – Exercise of functions under the Act.

The wording at section 61(3)(a) is amended from ‘prudent and feasible measures to conserve the heritage significance of the place or object’ to ‘if it is not reasonably practicable for the development to avoid harming the place or object – the reasonable steps that must be taken to minimise the extent of the harm’.

This does not change the intent or meaning of this section, it simply provides consistency and clarity.

Tree damaging activity etc

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Clause 47 – New part 10A

Clause 47 gives effect to new provisions which ensure that the Conservator of Flora and Fauna undertakes consultation with the Heritage Council and/or representative Aboriginal organisations about any matters affecting a tree registered under the *Tree Protection Act 2005* for its natural, Aboriginal or historic heritage values.

The clause establishes the type of advice which may be provided by the Council and/or a representative Aboriginal organisation, including that they may prescribe certain conditions requiring compliance by the applicant.

The Council or a representative Aboriginal organisation may provide advice about the tree damaging activity or tree management plan where they are satisfied that the proposal will harm the tree and diminish heritage significance or damage an Aboriginal tree. Consequential amendments to the *Tree Protection Act* at clauses 88 and 90 provide the timeframes in which the Council or a representative Aboriginal organisation must give this advice.

In providing advice to the Conservator, the Council or a representative Aboriginal organisation must provide advice about ways to avoid or minimise harm or risk.

Clause 47 makes further provision that, where the Council or a representative Aboriginal organisation has provided advice about a tree damaging activity or tree management plan, they must act consistently with that advice in any further activity, advice or decision that they make, unless other substantial information is provided. However, this provision does not include any additional information that is not otherwise required under the *Tree Protection Act* for the Conservator to make a decision about a tree damaging activity or tree management plan.

This section provides definitions for the terms ‘Aboriginal heritage tree’, ‘tree damaging activity’, ‘tree management plan’ and ‘tree protection notice’ which are used throughout this section.

The requirements under Part 10A are waived where public safety concerns dictate urgent remedial action.

Consequential amendments to the *Tree Protection Act 2005* at Part 3 of the Amendment Bill will compliment these provisions.

Permissions and approvals

Clause 47 – new Part 10B

Clause 47 inserts new Part 10B to make provision for the application and approvals processes for excavation permits, statements of heritage effects, and conservation management plans. The former two are new terms introduced to the Act to allow for additional exceptions to Part 13 offence provisions.

New section 61E explains the process for making an application to the Council for a permit to carry out archaeological excavation work. New section 61F explains the process whereby the Council may issue, or refuse to issue, a permit to excavate. New Section 61G explains the process for making an application to the Council for approval of a statement of heritage

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effect. New section 61H explains the process whereby the Council may approve, or refuse to approve, a statement of heritage effect. New section 61I provides the Council with power to direct the preparation of a statement of heritage effect. New section 61J explains the process for making an application to the Council for approval of a conservation management plan. New section 61K explains the process whereby the Council may approve, or refuse to approve, a conservation management plan.

The concepts of ‘permit to excavate’ and ‘statement of heritage effect’ are defined in this section.

The application and approvals processes for an excavation permit, a statement of heritage effect and a conservation management plan are similar.

A person must submit an application in writing which must be given to the Council and include certain information including the applicant’s name and address, the location or address affected by the application, and – for an excavation permit or statement of heritage effect – information about the nature of the activity to be undertaken, including extent and duration of the activity.

In the case of an application for excavation permit, the applicant must also include details about measures to be adopted to reduce risk of damage. In the case of a statement of heritage effect, the applicant must also include details about effects which may damage or diminish heritage significance or an Aboriginal place or object, measures which will be taken to mitigate those effects, and why alternative activities are not reasonably practical. For a conservation management plan, an applicant must include details of conservation measures to protect heritage significance.

The Council must consider an application and make a decision on it as soon as practicable after receiving the application. In considering an application for an excavation permit or to approve a statement of heritage effect, the Council must take into account whether there are reasonably practical alternatives, whether all reasonable steps will be taken to minimise harm, and if the activity is necessary.

An approval or permit may be issued with conditions.

Clause 47 also makes provision that the Council must notify an applicant about its decision within 15 working days.

Heritage Direction

Clause 48 – Sections 62 and 63

Sections 62 and 63 of the *Heritage Act 2004* make provision for the Minister to issue a Heritage Direction, based on the recommendation of the Council, to the owner or occupier of a place or object which has heritage significance.

Clause 48 amends these sections to:

- ensure that it is the Council, rather than the Minister, who has authority to issue a Heritage Direction;

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- ensure that a Heritage Direction may be issued not only for a place or object with heritage significance, but also for an Aboriginal place or object; and
- ensure that a Heritage Direction may be issued not only to the owner or occupier of a place or object, but also to a person whose work affects the place or object, such as a tradesperson, developer or building certifier.

These amendments strengthen the existing provisions in relation to the issuing of Heritage Directions, to ensure appropriate protection and conservation of heritage places and objects which are under serious and imminent threat.

Provisions under this clause also require that where heritage guidelines apply to the place or object, the Direction must not contradict the guidelines.

Clause 49 – Section 64(1)

Clause 49 amends the word ‘Minister’ to ‘Council’, to give effect to the amendments at Clause 48, where Heritage Directions will be issued under the Amendment Bill by the Council rather than the Minister.

Clause 50 – Section 66(2)

Clause 50 amends the wording of section 66(2) – Contravention of heritage direction, to create greater certainty. It also makes provision that a person with necessary knowledge or skills may accompany an authorised person to enter a premise to undertake activities prescribed by this section.

Clause 51 – Section 66(4)

Clause 51 amends the word ‘Minister’ to ‘Council’, giving effect to the amendments at Clause 48, where Heritage Directions will be issued by the Council rather than the Minister.

Clause 52 – new section 66(8)

Clause 52 provides a definition for the term ‘necessary assistance’, which is a term used throughout Part 11.

It defines ‘necessary assistance’ as 1 or more people who, in the opinion of the authorised person, have knowledge or skills that could assist the authorised person to carry out his or her function under this Part.

Heritage Offences

Clause 53 – new section 74(5)

Clause 53 clarifies the intent and meaning of section 74(5) in relation to the diminishment of heritage significance of a place or object and offence provisions of the legislation. This clause clarifies that this section refers only to registered (including provisionally registered) places and objects. Separate offence provisions apply for damage to an Aboriginal place or object.

Where an offence is committed against an Aboriginal place or object which is also a registered place or object, it is the offence provisions which apply to an Aboriginal place or object which are to be utilised.

Clause 54 – new section 76(2)(a)(vi) to (vii)

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Clause 54 inserts additional exceptions to the offence provisions, where a person engages in conduct in accordance with a permit to excavate issued by the Council, or in accordance with a Statement of Heritage Effect approved by the Council.

Enforcement

Clause 55 – Section 80(1)(b)(i) new note

Clause 55 clarifies that a registered place or object includes a provisionally registered place or object, for the purposes of power to enter premises. This does not change the intent or meaning of this section, it merely provides clarity and certainty.

Clause 56 – section 80(2)

Clause 56 corrects a minor typographical error of the *Heritage Act 2004*.

Clause 57 – section 80(5)

Clause 57 amends section 80(5) such that an authorised officer rather than inspector may enter premises to undertake activities associated with enforcement.

This clause also establishes that an authorised officer may enter premises with necessary assistance under circumstances established at existing sections 80(1)(a)-(c).

Necessary assistance is defined to mean anyone who, in the opinion of the authorised person, has knowledge or skills that could assist in the matter.

Clause 58 – section 81

Section 81 makes provision that an authorised person may not remain at a premise if the authorised person does not present his or her identity card when asked by the occupier.

Clause 58 amends this section to give effect to the amendments which enable another person or people with necessary skills or experience to accompany an authorised officer to a premise, ensuring that these people also must not remain on the premises if the authorised person does not present his or her identity card.

Clause 59 – Section 82(1)

Clause 59 corrects a minor typographical error in this section.

Clause 60 – New section 82(1)(b)(ia)

Clause 60 makes provision that an authorised person must tell an occupier the reason for, and identity of, any person accompanying the authorised person on the premises. This provision is inserted for reasons of ethical and fair conduct.

Clause 61 – New section 82(2)(a)(ia)

Clause 61 makes provision that, where an authorised person asks the occupier to sign a written acknowledgement consenting to enter the premises, the acknowledgement must include reference that the occupier was told the reason for, and identity of, any person accompanying the authorised person on the premises.

Clause 62 – section 85(1)

Section 85(1) makes provision in relation to a range of matters that an authorised person may require if a person ‘is committing, is about to commit, or has just committed, an offence’.

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Clause 62 omits the word ‘just’ from this section, to ensure that an authorised person may require certain details from the occupier if the occupier has, at some time in the more distant past, committed an offence.

Clause 63 – Section 87(1)

Clause 63 enables additional forms of communication to be used when applying for a search warrant, including by email and letter.

Clause 64 – section 87(4) and (5)

Clause 64 omits the word ‘fax’ as the sole means by which a copy of a warrant may be provided to an authorised person, and amends sections 87(4) and (5) to ensure that any form of communication may be used to provide a copy of a warrant.

Clause 65 – section 87(6)

Clause 65 amends wording to reflect the amendments at Clause 63 and 64, whereby a warrant may be provided through a range of different types of communication.

Heritage and public authorities

Clause 66 – sections 108, 109 and 109A

Clause 66 amends the need for a public authority to report on heritage assets annually and instead limits the requirement to report only once every three years.

Clause 66 also makes new provision requiring the Council to review reports submitted by public authorities, and provide the authority with any comments or recommendations about the conservation of a place or object mentioned in the report. Clause 66 makes provision that a summary report must also be provided to the Minister.

If any recommendations are made by the Council in reporting to a public authority, the Council may monitor the implementation of the recommendation.

Further provision is made at clause 66 to require public authorities to include in their annual reports information about recommendations or comments from the Council, and any action taken, or reasons for not taking action in relation to those matters.

Clause 67 – Section 110

Clause 67 strengthens existing provisions within the heritage legislation which enable the Council to direct a public authority to prepare a conservation management plan (CMP) for a heritage place or object for which the authority is responsible.

These provisions are strengthened to ensure that a public authority, if directed to prepare a CMP, must ensure that it is prepared to a standard satisfactory to achieve Council endorsement. A public authority will be required to submit revised plans until it is deemed acceptable to the Council.

When the Council approves a CMP, clause 67 makes new provision to ensure that the Council must notify the public authority in writing of its approval within 15 working days.

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Provision at this clause also enables the Minister to direct a public authority to prepare a CMP. Further provisions at this clause prevent duplication between a direction from the Minister and Council.

Provisions also ensure that, where a direction by either the Minister or Council has been given within the last five years, a new direction cannot be given by either entity until approval has been given for a CMP prepared under the direction, or the expiry of a five year period from the date of approval of a CMP.

Notification and review of decisions

Clause 68– Part 17

Part 17 provides for matters relating to reviewable decisions under the Act.

Definitions of interested persons, for the purposes of review rights, have been moved to section 13 under Clause 10, to ensure that all definitions of interested person are provided in the one place in the Act, for purposes of clarity and certainty.

Section 113 of the *Heritage Act 2004* has been amended to remove the word ‘only’ from the provision that the decision maker ‘must take reasonable steps to give a reviewable decision notice *only* to each interested person for the decision’. This amendment ensures that a reviewable decision notice may also be given to people other than interested persons.

New provisions are made under this clause for a stay of decision where the Council makes a decision about the registration or cancellation of a place or object and an interested person applies to ACAT for a review of the decision, to ensure that the decision is stayed until such time as the matter has been finally decided.

Miscellaneous

Clause 69 – section 115

Clause 69 omits section 115 as provisions previously contained in this section under the *Heritage Act 2004* are now included at Part 8, new section 53A.

Clause 70 – New section 118A

Clause 70 makes provision to enable the Council and the Minister access to property owner details for the purposes of notification of any matters under this Act for which interested persons must be notified.

The *Heritage Act 2004* requires the Council to notify interested persons, including property owners, of matters affecting them. However, privacy provisions of other legislation prevent the Council from obtaining up to date and accurate property owner contact details. This may effectively prevent property owners from being notified of important decisions that affect them, particularly in relation to registration decisions and the making of heritage guidelines.

New section 118A will ensure that the Council can undertake appropriate consultation with property owners about matters under the Amendment Bill which affect them.

Clause 71 – section 121

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Section 121 enables the Council to delegate its functions under the Act to the director-general. Clause 71 expands this power of delegation to enable the Council to also delegate its functions under another territory law. The Council has functions under other Territory laws including the *Planning and Development Act 2007*.

Transitional provisions

Clause 72 - New Part 20

Clause 72 introduces a new Part 20 into the legislation, to establish transitional arrangements which apply between the *Heritage Act 2004* and the Amendment Bill.

Section 200 in new Part 20 provides the commencement day for the transitional provisions to apply. This is the day after the notification day for the Act.

Section 201 makes provision that nominations made under the *Heritage Act 2004* which have not been dismissed by the Council and for which no decision on provisional registration has previously been made, are taken to be nominated places or objects, and are assumed to have been accepted by the Council. However, where the nomination details do not meet the requirements at section 28, the nomination may be dismissed by the Council and is not taken to be a nominated place or object.

Nominations made under previous heritage legislation are also validated by these transitional arrangements and are taken to be nominated places and objects if they meet the requirements of s.28 of the *Heritage Act 2004*, have not been dismissed by the Council, and for which no decision on provisional registration has previously been made.

Section 202 makes provision that, where a period of public consultation has begun for a decision about provisional registration, a cancellation proposal, or a proposal to make heritage guidelines, the provisions of the *Heritage Act 2004* will continue to be followed until such time as a final decision under the part of the Act to which public consultation applies, is made.

Section 203 ensures that further transitional provisions related to this Amendment Bill may be prescribed by regulation.

Subsection 203(3) provides that regulations may be made, prescribing any further necessary transitional matter, to ensure the effective operation of the Amendment Bill, and the appropriate recognition, protection and conservation of the ACT's unique heritage places and objects.

The section is not expressed, and does not intend, to limit future enactments of the Legislative Assembly. Nor does it restrain the power of the Legislative Assembly to make laws. It is understood that this provision could itself in future be amended or repealed by the Assembly at any time like other pieces of legislation and that the Assembly could make another law that overrides this law if necessary.

Section 204 makes provision that the transitional arrangements expire 5 years after the commencement day, but continue to have effect after their repeal.

Schedule 1

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Clause 73 – Schedule 1

Clause 73 makes amendment to reviewable decisions.

It gives effect that:

- a decision not to provisionally register a place or object is no longer a reviewable decision;
- a decision to extend or not extend the period of public consultation is no longer a reviewable decision;
- a decision made by the Minister under new Part 7A is not a reviewable decision; and
- under section 62 – Heritage Directions – the Council rather than the Minister is the decision maker, consistent with amendments at section 62.

The current right to seek review of heritage decisions that may be appealed is far wider reaching than any heritage legislation in other jurisdictions, or comparable legislation in the ACT such as the *Planning and Development Act 2007*, the *Tree Protection Act 2005* and the *Nature Conservation Act 1980*.

As such, reviewable decisions will be brought in-line with other jurisdictions and comparable legislation in the ACT. In particular, this will be achieved through removing an appeal right against a decision by the Heritage Council not to provisionally register a place or object as there is no strong natural justice argument for retaining this provision, particularly as the concerned party can provide a fresh nomination to the Heritage Council with a new or redeveloped argument and evidence for provisional registration.

The decision to extend (or not extend) the five month provisional registration period as a reviewable decision will be removed. It appears that this reviewable decision serves little benefit as it is probable that a registration decision would occur prior to ACAT hearing the appeal. Instead, provision is included in the Amendment Bill at Clause 27 so that the Council can extend the provisional registration period, with the Minister able to overturn this decision within ten working days.

The lack of appeal against a decision of the Minister is consistent with other similar call-in provisions of comparable ACT legislation, such as the *Planning and Development Act 2007*.

Full explanations for these provisions is given under the heading ‘Human rights analysis’ on page 2.

Dictionary

Clause 74 – Dictionary, note 2

Clause 74 inserts four new terms which are contained in the Legislation Act and which are introduced into the Amendment Bill – ‘commissioner for revenue’, ‘interest’, ‘notification’ and ‘territory land’.

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These definitions give effect to matters which are raised throughout the clauses of the Amendment Bill.

Clause 75 – Dictionary, new definitions

Clause 75 provides new definition for terms introduced in the Amendment Bill - ‘Aboriginal heritage tree’ and ‘appeal period’

Clause 76 – Dictionary, definitions of *cancellation proposal* and *conservation management plan*

Clause 76 provides an amended definition for the terms ‘cancellation proposal’ and ‘conservation management plan’.

Clause 77 – Dictionary, new definitions

Clause 77 provides new definition for terms introduced in the Amendment Bill - ‘Conservator’, ‘consultation notice’, ‘cultural heritage significance’, ‘decision maker’, ‘excavation application’, ‘excavation permit’, ‘Flora and Fauna Committee’, ‘heritage decision’, ‘heritage finding’, and ‘heritage report’.

These definitions give effect to matters which are raised throughout the clauses of the Amendment Bill.

Clause 78 – Dictionary, definition of *interested person*

Clause 78 removes the definition of ‘interested person’ from the Dictionary, as it is provided at section 13.

Clause 79 – Dictionary, definition of *natural heritage significance* and *nominated*

Clause 79 inserts a new definition for the term ‘natural heritage significance’ as defined in section 10A.

Clause 79 also provides a definition for the term ‘nominated’ in relation to a place or object, to give effect to the distinction within the Amendment Bill to differentiate between the two concepts of a ‘nomination application’ and a ‘nominated place or object’ – the latter having effect once a nomination application has been accepted by the Council.

This clause also makes provision to ensure that a place or object which had been provisionally registered, but for which the period of provisional registration lapsed with no further extension or decision on final registration, is taken to be a nominated place or object. This applies for those places and objects which were previously nominated, and also for those which were not previously nominated, but for which the Council made a decision on provisional registration.

Clause 80 – Dictionary, definition of *nomination*

Clause 80 omits the definition of ‘nomination’ from the Amendment Bill, to be replaced by the new terms for ‘nomination application’ and ‘nominated place or object’.

Clause 81 – Dictionary, new definition of *nomination application*

Clause 81 provides a definition for the term ‘nomination application’ in relation to a place or object, to give effect to the distinction within the Amendment Bill to differentiate between

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the two concepts of a ‘nomination application’ and a ‘nominated place or object’ – the latter having effect once a nomination application has been accepted by the Council.

Clause 82 – Dictionary, definition of *nomination details*

Clause 82 omits the definition of ‘nomination details’ as this is no longer warranted, in light of the changes to definitions of ‘nomination application’ and ‘nominated place or object’, above.

Clause 83 – Dictionary, new definition of *notice of finding*

Clause 83 provides a new definition for ‘notice of finding’, to give effect to new provisions which require the Council to report to the Minister ahead of making a decision about a range of registration and cancellation matters.

Clause 84 – Dictionary, definition of *object*

The definition of ‘object’ was provided at section 8(2) of the *Heritage Act 2004*. It is now provided at section 8. Clause 84 reflects this change and is merely an administrative amendment.

Clause 85 – Dictionary, definition of *place*

The definition of ‘place’ was provided at section 8(1) of the *Heritage Act 2004*. It is now provided at section 8. Clause 85 reflects this change and is merely an administrative amendment.

Clause 86 – Dictionary, new definitions

Clause 86 inserts new definitions in the Amendment Bill for the terms ‘precinct’, ‘referable heritage matter’ and ‘register amendment application’.

Referable heritage matter refers to those decisions which the Minister may call-in.

These definitions give effect to matters which are raised throughout the clauses of the Amendment Bill.

Clause 87 – Dictionary, definition of *representative Aboriginal organisations and restricted information*

Clause 87 omits the definition of representative Aboriginal organisations, as it is superseded by clause 88 below.

Clause 88 – Dictionary, new definition of *representative Aboriginal organisation*

Clause 88 provides a new definition for representative Aboriginal organisation, amending the wording from ‘organisations’ to ‘organisation’, consistent with its use and reference at section 14. This change does not change the intent or meaning of this definition, it merely clarifies the definition.

Clause 89 – Dictionary, definition of *restricted information*

Clause 89 amends the definition of ‘restricted information’ to provide greater clarity. It does not change the intent or meaning of this definition.

Clause 90 – Dictionary, new definitions

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Clause 88 inserts new definitions in the Amendment Bill for ‘statement of heritage effect’, ‘tree damaging activity’, ‘tree management plan’ and ‘urgent provisional registration application’.

These definitions give effect to matters which are raised throughout the clauses of the Amendment Bill.

Part 3 – Tree Protection Act 2005

Clause 91 – New sections 24A to 24C

Clause 91 inserts new provisions in the *Tree Protection Act 2005*, to give effect to new requirements that the Conservator must seek advice from the Council in relation to an application for a tree damaging activity where it concerns a tree which forms part of a place with heritage significance; and from representative Aboriginal organisations where it relates to a tree that is an Aboriginal heritage tree.

Clause 91 establishes the processes and procedures, including timeframes, for this to occur.

Provision is made that where either the Council or a representative Aboriginal organisation does not give advice within the stated timeframes, this is taken to be support for the application.

Clause 92 – New section 25(3)(ba)

Clause 92 makes provision to ensure that the Conservator, in making a decision about an application for a tree damaging activity, must consider any advice given by the Council or a representative Aboriginal organisation.

Clause 93 – New sections 34A to 34C

Section 34 of the *Tree Protection Act 2005* makes provision that the Conservator may ask the tree advisory panel for advice on a proposed tree management plan. Clause 93 establishes provisions to ensure that the Conservator must also give a copy of the proposal to the Heritage Council and/or a representative Aboriginal organisation, as appropriate, for their advice.

Clause 93 establishes the processes and procedures, including timeframes, for this to occur.

Provision is made that where either the Council or a representative Aboriginal organisation does not give advice within the stated timeframes, this is taken to be support for the proposal or application.

Clause 94 – New section 35(4)(ba)

Clause 94 makes provision to ensure that the Conservator, in making a decision about a tree management plan, must have regard to any advice given by the Council or a representative Aboriginal organisation under section 34A of the *Tree Protection Act 2005*.

Clause 95 – Schedule 1, Part 1.1

Schedule 1, Part 1.1 of the *Tree Protection Act 2005* makes provision for reviewable decisions, and establishes which entities may appeal against certain decisions.

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Clause 95 amends this Part to ensure that both the Heritage Council and representative Aboriginal organisations are able to appeal a decision of the Conservator to approve or refuse to approve a tree damaging activity, a decision to cancel the approval of a tree damaging activity, and the decision to approve, or refuse to approve a tree management plan.